McDonnell Douglas Corporation; McDonnell Douglas Electronic Systems Company, a Division of McDonnell Douglas Corporation; and McDonnell Douglas Aerospace Information Services Company, a Division of McDonnell Douglas Corporation, Single and/or Joint Employers *and* Southern California Professional Engineering Association and McDonnell Douglas Tulsa, a Division of McDonnell Douglas Corporation; McDonnell Douglas Space Systems Company, a Division of McDonnell Douglas Corporation; and Douglas Aircraft Company, a Division of McDonnell Douglas Corporation, Parties to the Contract. Case 21–CA–27479

September 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision[1] present the issue of whether the Respondent[2] unlawfully removed certain employees from the bargaining unit upon their December 1989 change of assignment from one to another of the Respondent's subsidiary division companies, where they continued without interruption to do the same work in the same place under the same immediate supervision as before.

A threshold procedural issue is whether to defer consideration of the above substantive issue to the parties' contractual grievance-arbitration procedure.

The National Labor Relations Board has considered the exceptions in light of the record and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

For the reasons fully discussed below, and contrary to the judge's recommendation, we do not defer consideration of the issue to the parties' grievance-arbitration procedures. On the merits, we find that the Respondent has violated Section 8(a)(5) and (1) of the Act.

I. BACKGROUND

A. *Bargaining Unit and Respondent's Organizational Background*

The facts of this case are complex, but can be summarized as follows.

The Union has represented certain of the Respondent's professional technical and engineering employees under a series of collective-bargaining agreements. The current agreement (the 1990–1993 agreement) is for March 5, 1990, through February 28, 1993. The most recent previous agreement (the 1987–1990 agreement) was for February 9, 1987, through December 3, 1989, extended to March 5, 1990.

The 1987–1990 agreement covered employees in certain job classifications in the Douglas Aircraft Company (DAC), the McDonnell Douglas Astronautics Company-Huntington Beach (MDAC), and McDonnell Douglas-Tulsa (MDT). These three companies are components of the parent company, McDonnell Douglas Corporation (MDC). Among the bargaining unit employees covered by the contract were those in the job classifications (as listed in ''Appendix A'' of the contract) of computing analysts, computing engineers, computing specialists, and senior computing specialists. Appendix A also expressly covered certain employees in the above four classifications who were employed by the McDonnell Douglas Aerospace Information Services Company (MDAIS), which was also a component company of MDC, but which was not itself a named employer party to the contract.

MDAIS sold computer and engineering information services, and leased computer and engineering professional employees (unit and nonunit), to various component companies of the Respondent (including the employer parties to the contract), who in turn paid MDAIS for these services and the leased employees. Approximately 50 MDAIS unit employees were leased to MDAC and worked side-by-side with MDAC unit and nonunit employees at Huntington Beach.

In December 1988, MDAC was reorganized into two new component companies of MDC: McDonnell Douglas Space Systems Company (MDSSC) and McDonnell Douglas Electronic Systems Company (MDESC), both of which continued to operate at the former MDAC location in Huntington Beach. MDAC's unit and nonunit employees were reassigned to, and became employees of, either MDSSC or MDESC, depending upon the particular nature of their work, without change in representational status.

After this reorganization, unit and nonunit employees of MDESC and MDAIS worked side-by-side or in close proximity on the same or similar projects, and performed the same or similar technical and engineering duties, under common MDESC first-line technical and work assignment supervision, with essentially the same wages, hours, and working conditions. MDESC supervisors provided MDAIS employees with work assignments, priorities, technical direction, performance reviews, and made recommendations for performance bonus awards, special training requirements, and salary adjustments. MDAIS employees, however, also re-

[1] On June 3, 1992, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

[2] In their answer to the complaint, the Respondents admit that they constitute a joint employer of the McDonnell Douglas Aerospace Information Services Company (MDAIS) employees working at the instant Huntington Beach, California facility, which group includes the particular employees in question in this case. The Respondents are collectively referred to in this case as the Respondent.

ported to MDAIS ''administrative supervisors,'' for matters pertaining to their pay, hours, attendance, general training, and formal performance evaluation. Thus, MDAIS employees received their annual performance evaluations from on-site MDAIS administrative supervisory-management personnel. As a practical matter, however, these MDAIS administrative supervisors would generally consult with the appropriate MDESC first-line technical supervisors to obtain verification that their (i.e., MDAIS') assessment was correct and to get whatever feedback MDESC could provide to them at that time. MDESC supervisors could not directly discipline MDAIS employees, although MDESC management could return MDAIS employees to MDAIS. Also, merit increases for MDESC and MDAIS employees were separately determined by their respective managements. Finally, MDESC and MDAIS employees had different career advancement paths through their respective companies, and employee potential for such advancement was assessed differently by these two companies.

B. *The Embedded System Software Agreement*

In October 1988, a couple of months before the reorganization of MDAC into MDSSC and MDESC, the Union and MDAC had entered into a written settlement of a grievance over the unit placement of certain MDAC employees involved in the development of embedded system software.[3] This agreement, referred to herein as the Embedded System Software Agreement (ESSA), established written guidelines for determining present and future unit placement of MDAC (soon to be MDSSC or MDESC) employees working in various phases of the embedded software development lifecycle. Specifically, the parties agreed that employees working in the definition of system and software requirements phase, and the system integration and testing phase of the lifecycle were performing bargaining unit work and therefore would be included in the unit. But the parties also agreed that employees working in the preliminary and detailed software design phase, and the software implementation and testing phase of the lifecycle were *not* performing unit work and therefore would be excluded from the unit. Finally, the parties agreed ''to continue their efforts to achieve a practical and mutually satisfactory mechanism to insure compliance with the undertakings set forth above.''

The ESSA was applied by mutual agreement of the parties to resolve the unit placement of eight MDAC employees. The ESSA was *not*, however, made applicable to the MDAIS employees leased to MDAC who were also working in the embedded system software development lifecycle. Indeed, at the time the ESSA was finalized and applied to MDAC employees in October 1988, there was no consideration given to applying it also then or in the future to the MDAIS leased employees who were also working in the various phases of the lifecycle. In fact, the MDAIS employees had not been included in the Respondent's comprehensive audit of lifecycle job functions leading up to the finalization of the ESSA.

[3] See fn. 4 of the judge's decision for a discussion of this term.

II. THE CHANGE OF ASSIGNMENT IN ISSUE HERE

In December 1988, shortly after finalization of the ESSA, and around the same time of the reorganization of MDAC into MDSSC and MDESC, parent MDC decided to reassign the MDAIS employees to the component companies they served. Consequently, these employees would become employees of the components themselves.

The first of these changes occurred in June 1989. About 300 MDAIS employees were reassigned to DAC. About 75 of these 300 were MDAIS unit employees. All 75 of them remained unit employees in DAC, changing their assignment without any change in their representational status.

About 6 months later, in late December 1989, the rest of the MDAIS employees were reassigned to MDSSC and MDESC. About 66 of them were reassigned to MDSSC. Fifteen of these 66 were MDAIS unit employees. All 15 of them remained unit employees in MDSSC, changing their assignment without any change in their representational status.

There were 39 MDAIS employees reassigned to MDESC.[4] Thirty-five of them were MDAIS unit employees. Three of them remained unit employees in MDESC, changing their assignment without any change in their representational status. The other 32 MDAIS unit employees were working in the embedded system software lifecycle. The Respondent applied the ESSA to them, as new MDESC employees, and determined that the lifecycle phases in which they were currently working did *not* entail unit work as defined by the ESSA. The Respondent thereupon removed them from the unit.

It is this removal of former MDAIS unit employees from the unit upon their change of assignment from MDAIS to MDESC, without any corresponding change in duties, tasks, location, or immediate supervision, that is principally alleged to have violated the Act.

III. THE DEFERRAL ISSUE

In the final paragraph of section III,C of his decision, the judge found that the instant dispute seemed to be a situation peculiarly susceptible to resolution

[4] In this context, the judge's references to ''MDISC'' in fn. 6, and to ''MDSIC'' in sec. III,B, par. 16, are both apparently typographical errors. In any event, they are both corrected to read ''MDAIS.''

through the grievance and arbitration machinery contained in the parties' collective-bargaining agreement. Accordingly, he recommended deferral of the issues to arbitration and dismissal of the complaint in its entirety. We disagree with the judge's recommendation for deferral.

The instant issue—whether the Respondent unlawfully removed the 32 former MDAIS employees from the bargaining unit—necessarily involves the rights of these employees to be represented by the Union. Representation issues involve the application of basic statutory policy and standards, and are matters for decision exclusively by the Board, not an arbitrator.[5]

In recommending deferral, the judge relied on *Transport Service Co.*, 282 NLRB 111 (1986). And, in response to the General Counsel's exceptions to the judge's recommendation to defer, the Respondent also relies on that case, as well as on *Leland Stanford Junior University*, 288 NLRB 1129 (1988), and *NCR Corp.*, 271 NLRB 1212 (1984). We find these cases to be distingishable from the instant case.

In *Transport Service*, the relevant unfair labor practice issue that was deferred to grievance arbitration involved the question of whether certain *work* performed by nonunit employees should be performed instead by employees represented by the charging party union. In *Transport Service*, unlike the instant case, there were no representational questions about whether the nonunit *employees* would become represented, or whether the represented *employees* would become unrepresented.

In *Leland Stanford Junior University*, supra, the unfair labor practice issue which the employer sought to have deferred to grievance arbitration was whether the employer unlawfully failed to furnish the union with requested information. The Board refused to defer. Although the judge in *Leland Stanford* speculated that an arbitrator could resolve a representation question, neither the General Counsel nor the charging party filed exceptions and thus that issue was not before the Board for consideration.

In *NCR*, supra, the unfair labor practice issue was whether the employer violated the Act by unilaterally transferring certain unit work out of the unit and by contemporaneously eliminating a unit job classification. In finding that the employer had not acted unlawfully as alleged, the Board found the dispute to be solely one of contract interpretation, and that the employer had acted reasonably on a substantial claim of contractual privilege, based on its adherence to one of two equally plausible interpretations of the contract. But more importantly, however, for purposes of our analysis of the Respondent's argument that the instant unfair labor practice issue should be deferred to grievance arbitration, we note that the employer in *NCR* did not seek deferral of the unfair labor practice issue to the contract's grievance-arbitration machinery. Indeed, the Board noted in *NCR* that deferral was not an issue before it, and, accordingly, expressly did not find that deferral was warranted. 271 NLRB at 1213 fn. 7.

In light of the above considerations, and contrary to the judge's recommendation, we do not defer the instant dispute to the parties' contractual grievance-arbitration mechanism. Consequently, we now consider the merits of the instant dispute.

IV. DECEMBER 1989 REMOVAL FROM THE UNIT

An employer violates the Act when it removes a substantial group of employees from a bargaining unit, unless it either (1) obtains the agreement of the union to do so, or (2) is able to establish that the removed group is sufficiently dissimilar from the remainder of the unit to warrant removal.[6]

A. *No Agreement by the Union*

The Respondent argues that the Union agreed at the time of the December 1989 MDAIS-to-MDESC changes of assignment to permit the Respondent unilaterally to apply the October 1988 ESSA to make and implement initial determinations about which of the former MDAIS unit employees would remain in or be removed from the unit as newly assigned MDESC employees. We find, contrary to the Respondent's assertion, that the preponderance of the evidence does not establish that the Union agreed to permit the Respondent to remove MDAIS employees from the unit upon their change of assignment to MDESC.

At the time of the December 1989 change of assignment of MDAIS employees to MDESC, the parties were engaged in negotiations for a renewal collective-bargaining agreement (the most recent agreement had expired on December 3, 1989, and was ultimately extended to March 5, 1990, when the parties entered into their renewal contract).

L. Russell Jansen, MDESC staff senior manager, employee relations, was questioned at the hearing about whether he had informed the Union's chief negotiator, Executive Director Leonard Ricks, at a meeting just prior to a contract negotiating session in late November or early December 1989, that the instant group of 32 MDAIS employees would transfer to MDESC and be removed from the unit because they

[5] *Jayar Metal Corp.*, 297 NLRB 603, 608–609 (1990); *Paper Mfrs. Co.*, 274 NLRB 491, 494–496 (1985), enfd. 786 F.2d 163, 166 (3d Cir. 1986); *Marion Power Shovel Co.*, 230 NLRB 576, 577–578 (1977).

[6] E.g., *United Technologies Corp.*, 292 NLRB 248 (1989), enfd. 884 F.2d 1569 (2d Cir. 1989); *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1139–1141 (1982), enfd. 721 F.2d 187 (7th Cir. 1983).

performed ''embedded system work.''[7] Jansen did not directly answer the part of the question having to do with whether he had informed Ricks that the MDAIS employees were being removed from the unit. Rather, he answered only that he had informed Ricks of ''the Company's decision to reclassify those employees from the MDAIS Company to [MDESC].'' Jansen further testified, however, that Ricks had replied by stating that if the Respondent ''proceeded with that, there would be a Board charge filed.'' In any event, Jansen's testimony does not show that the Union agreed to permit the Respondent unilaterally to remove the transferring MDAIS employees from the unit.

Ricks testified that during contract renewal negotiations in late 1989, ''there were a couple of very brief conversations about [the reassignment of employees from MDAIS to MDESC], which were really inconclusive, I think,'' and that DAC's principal negotiator, Ken Eriksen, general manager of labor/management partnership, had told Ricks at that time that Eriksen ''didn't know what was going on and that it was very confused and that we'd catch up with it later.'' Eriksen did tell Ricks that there was ''good language'' in the recognition clause of the collective-bargaining agreement, that that was the best ''assurance'' that the Respondent could give to the Union, and that Ricks should ''not worry.''

Ricks testified specifically that he had not agreed that the Respondent could remove the employees in question from the unit. Moreover, according to Ricks, he did not believe that there had been any discussion during negotiations, or anything that otherwise would have put the Union on notice, that employees were going to be removed from the unit.[8] According to Ricks, ''[t]hat simply was not told to us in advance.'' Ricks testified that the parties did not discuss the removal of the former MDAIS employees from the unit until January 1990, after the Union found out that the removals had been effected. According to Ricks, when the Union did find out about the removals, ''we took a very consistent position that the people belonged in our unit, should remain in the unit, and we didn't care which company they were assigned to, they belonged in our unit.'' Finally, Ricks testified that Eriksen had made a commitment during contract negotiations that the Respondent would attempt to resolve classification matters arising from the reassignment of MDAIS employees and to place employees where they ''belonged'' after the employees had been transferred and after the Union saw what the employees were going to be doing.

In arguing that the Union had agreed in advance to permit the Respondent unilaterally to remove MDAIS employees from the unit upon their change of assignment to MDESC, the Respondent relies mainly on the testimony of its principal negotiator, DAC's labor general manager Eriksen. We find that Eriksen's testimony, as excerpted and summarized in the following paragraphs, does not establish that the Union made such an agreement.

According to Eriksen, almost as soon as negotiations for a renewal collective-bargaining agreement began in October 1989, the Union expressed its concern about the upcoming change of assignment of MDAIS unit employees to MDESC. The Union was concerned about the fact that there would be ''mixed people'' (i.e., represented and unrepresented) under the same supervision, and about how that circumstance was going to be handled. According to Eriksen, the Union wanted to address and resolve this question at the bargaining table. But Eriksen did not want to discuss this in the contract negotiating sessions—''We had a difficult enough task in front of us anyway.'' On direct examination, Eriksen testified that:

> I recommended that we not bring it to the negotiations table, that we defer it and handle the transfer of the MDAIS employees . . . like we would normally handle that kind of stuff. . . . that we handle it as we have other issues in the past concerning classification questions: Should an employee on the basis of his or her work be classified in the bargaining unit or in an unrepresented classification? Let's do it the way we have in the past . . . they weren't ecstatic about it, but they agreed.

As mentioned earlier, ''the way'' the parties handled unit placement questions ''in the past'' was to reach agreement on how employees should be reclassified under the ESSA.

Eriksen was questioned about this testimony on cross-examination, in the following colloquy with counsel for the General Counsel:

> Q. You've testified that at the bargaining table, the Union wanted information about how the changes at MDAIS would be implemented and whether or not Union or non-Union people would be working for a supervisor, and you stated that in an attempt that you wanted to put that on the back burner or you wanted it not to be discussed during negotiations, and I believe your testimony

[7] Contrary to the implication of this question, however, and as seen from the above discussion of the ESSA, not all ''embedded system work'' was nonunit work.

[8] Ricks testified that these discussions about MDAIS employees being reassigned to other companies did not cause him to suspect that MDAIS unit employees would be removed from the unit upon such reassignment. As seen above, 6 months earlier, in June 1989, the first contingent of MDAIS employees had been reassigned to DAC, with no change in the representational status of any of the approximately 75 MDAIS unit employees upon their assignment to DAC.

was that the Union was not ecstatic about that. What did they say?

A. Well, as I recall, the Union expressed concern that we would do it in a way that was agreeable with them, and I jokingly, after I had discussed how we would do it in terms of the work performed and the practice of assigning the work and the recognition clause in the contract, I said jokingly not to worry, and as I recall, Len [Ricks] said something to the effect, ''Why do I get a warm feeling to that?'' or something, and there was a lot of laughter. But they did agree to let it be resolved away from the bargaining table.

Q. You say they did agree to it. You mean they didn't bring it up again at that time?

A. They didn't bring it up. The only time they brought it up at the bargaining table was on February 15th [i.e., the final day of contract negotiations]. But we had discussed it away from the bargaining table a few times. And at all the [component companies] it was being discussed away from the bargaining table to one extent or another.

We find that the record does not establish that the Union agreed that the Respondent could unilaterally remove the MDAIS unit employees from the unit upon their change of assignment to MDESC. More specifically, we find that the record does not establish that the Union agreed to permit the Respondent unilaterally to apply the ESSA to the MDAIS unit employees, determine that they were no longer in the unit, remove them from the unit, and then present the Union with the fait accompli of their removal. We find instead that the testimony of Ricks, Eriksen, and Jansen establishes only that Ricks and Eriksen agreed that job classification and resulting unit placement questions emanating from the MDAIS-to-MDESC conversion would be resolved together by the parties—not unilaterally by the Respondent—after the parties had completed their negotiations for a renewal collective-bargaining agreement.

B. *No Showing of Sufficient Change to Warrant Removal from Unit*

The preponderance of the evidence relevant to this question establishes that the job duties and functions, and terms and conditions of employment, of the MDAIS unit employees remained essentially unchanged upon the change of assignment of these employees from MDAIS to MDESC.

More specifically, former MDAIS unit employee Lazarus testified that there was no change in his duties or workplace as a result of his change of assignment from MDAIS to MDESC.[9] Senior Staff Manager for MDESC Employee Relations Jansen testified that upon their change of assignment from MDAIS to MDESC, at least 30 of the 32 former MDAIS unit employees in question remained working at the same desk in the same location for MDESC as they had been for MDAIS, and that while one or two other former MDAIS employees may have been assigned to different buildings or work areas upon their assignment to MDESC, Jansen's understanding was that they continued to perform the same work for MDESC as they had for MDAIS. MDESC Senior Manager for Software Development Lawrence Gunther testified that there was no change in the functions performed by the former MDAIS employees following their transfer to MDESC. The Respondent's vice president Schluter testified that there was no difference in the work assignment or supervision given to a person because he or she had formerly been a MDAIS employee. The Respondent's labor general manager Eriksen testified that at the time of the December 1989 transfer of MDAIS unit employees to MDESC, the wages, hours, and working conditions of the unit employees were ''basically'' the same as the nonunit employees.

Accordingly, we find that the job duties and functions, and terms and conditions of employment, of the MDAIS unit employees have not been shown to have become sufficiently dissimilar from those of the remaining unit employees so as to warrant the Respondent's unilateral removal of the MDAIS employees from the unit upon their change of assignment to MDESC.[10]

In light of the above considerations, we find that the Respondent has violated Section 8(a)(5) of the Act by unilaterally removing the former MDAIS unit employees from the unit upon their reassignment to MDESC in December 1989.

V. MARCH 1990 TEMPORARY RECLASSIFICATION AS UNIT EMPLOYEES

The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) by temporarily transferring/reclassifying these 32 employees briefly back into the unit for about 5 days in March 1990, for the administrative-bookkeeping purpose of formally paying them their delayed 1989 merit wage increase (which they had earned as *MDAIS* unit employees, but

[9] Lazarus was the only former MDAIS unit employee to testify.

[10] See *United Technologies Corp.*, 292 NLRB 248, supra; *Bay Shipbuilding Corp.*, 263 NLRB 1133, supra.

We find *Boeing Co.*, 212 NLRB 116 (1974), relied on by the Respondent, to be distinguishable from the instant case. In *Boeing*, the 54 employees removed from the 8800 employee unit were found to have been erroneously *initially* included in the unit as a result of a mistaken application of incorrect job titles. When, as a result of an audit, the employer discovered this incorrect initial classification and inclusion of these employees in the unit, it unilaterally corrected their job titles and removed them from the unit. In dismissing the refusal-to-bargain allegation, the Board found that (unlike in the instant case), the union had never been accorded representation rights for the employees who were subsequently removed from the unit.

which they had not received before being reclassified as *MDESC nonunit* employees in late December 1989), with funds from a merit wage increase pool set aside for unit employees. The judge, having found that the earlier December 1989 removal of the employees was lawful, also found in footnote 9 of his decision that this subsequent March 1990 temporary return of the employees to the unit, followed quickly by their removal again, was also lawful, as having been done for a legitimate administrative purpose after notice to and discussion with the Union.

We disagree with the judge, and for essentially the same reasons for which we found the December 1989 removal from the unit to be unlawful—no agreement by the Union, and no showing of changed circumstances sufficient to warrant unilateral return and removal—we also find the March 1990 return to and removal from the unit to be unlawful.

A. *No Agreement by the Union*

Union Executive Director Ricks testified that he did not agree to the Respondent's proposal that the former MDAIS employees be returned to the unit temporarily, to be paid their 1989 unit-based merit wage increase, and then to be removed again from the unit. Rather, he insisted that they be returned permanently to the unit. Thus, Ricks testified that when the Respondent proposed during renewal contract negotiations in February 1990 to put the former MDAIS unit employees back in the unit for this purpose:

> [M]y response was, ''They belong in our unit. Put them back in and leave them there. But if you don't believe they belong in our unit, don't put them in and go find your money somewhere else.'' . . . We certainly didn't object to them being put in the unit. We felt they belonged there. . . . Our objection was to them being taken out again. . . . We objected to the people being removed from the unit . . . If he put them back into the unit, gave them their money, and left them there as we suggested, then we certainly wouldn't have been at the Board [i.e., filed unfair labor practice charges].

DAC Labor General Manager Eriksen testified, consistently with Ricks, that when the Respondent proposed the temporary return of the former MDAIS unit employees to the unit for the above-described purpose:

> [The Union] said ''It sounds dumb to us. You can do whatever you want to. What we want you to do, though, is to leave them in the [unit], and you've got to realize that no matter what you do, it isn't going to stop us from filing a charge on the decision to take them out of the [unit].'' . . . [W]e agreed that in no way would we try to depict their acquiescence of our doing that to mean that they agreed with our taking them out, permanently out of the bargaining unit.

Thus, we find that the evidence does not establish that the Union agreed to the temporary return of the employees in question to the unit for a few days in March 1990. Rather, the evidence establishes that the Union consistently maintained its position that these employees should not have been removed from the unit in the first place, in December 1989, and that any subsequent return to the unit should have been permanent.

B. *No Showing of Changed Circumstances*

The Respondent does not argue, and the record certainly does not show, that this March 1990 temporary return and almost immediate removal of the employees to and from the unit was warranted by any changes in the employees' job duties and functions or terms and conditions of employment. The record amply establishes that it was no more nor less than what the Respondent itself maintains it was—simply an administrative-bookkeeping transaction.

In light of the above considerations, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by temporarily returning the former MDAIS unit employees to the unit in March 1990, and then removing them again.

CONCLUSIONS OF LAW

1. At all times material the Union has been the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act of the employees described in section 1, ''Employees Represented,'' of article I, ''Recognition,'' of the 1987–1990 and 1990–1993 collective-bargaining agreements between the Respondent and the Union.

2. By unilaterally, without the Union's agreement, removing the former MDAIS bargaining unit employees from the above bargaining unit upon their December 1989 change of assignment to MDESC, the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

3. By unilaterally, without the Union's agreement, returning the former MDAIS bargaining unit employees described above to the bargaining unit in March 1990, and thereafter in March 1990 unilaterally, without the Union's agreement, removing them again from the bargaining unit, the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

4. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it

cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order that the Respondent return the former MDAIS bargaining unit employees, who were reassigned to nonunit MDESC positions in December 1989, and March 1990, to the bargaining unit, without loss of seniority; recognize the Union as the collective-bargaining representative of those employees, as part of the recognized bargaining unit; apply the terms of the applicable collective-bargaining agreements to these employees; and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful removal of them from the bargaining unit in December 1989 and again in March 1990, and failure to apply the terms of the applicable collective-bargaining agreements to them.[11] Any amounts of money necessary to make employees whole under the terms of this remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Nothing in the Order shall be construed as requiring the Respondent to rescind any wage increases or other improved benefits or terms or conditions of employment which may have been afforded to the unlawfully removed unit employees during the period of their unlawful removal from the unit.

ORDER

The National Labor Relations Board orders that the Respondent, McDonnell Douglas Corporation; McDonnell Douglas Electronic Systems Company, a division of McDonnell Douglas Company; and McDonnell Douglas Aerospace Information Services Company, a division of McDonnell Douglas Company, Huntington Beach, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally removing bargaining unit employees from, and returning them to, the bargaining unit described in section 1, ''Employees Represented,'' of article I, ''Recognition,'' of the 1987–1990 and 1990–1993 collective-bargaining agreements between the Respondent and the Southern California Professional Engineering Association (the Union).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Return the former MDAIS bargaining unit employees, who were reassigned to nonunit MDESC positions in December 1989 and March 1990, to the bargaining unit referred to in paragraph 1(a) above, without loss of seniority.

(b) Recognize the Union as the collective-bargaining representative of the above employees, as part of the recognized bargaining unit, and apply the applicable collective-bargaining agreements to them.

(c) Make the above employees whole, in the manner prescribed in the remedy section of this decision, for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful removal of them from the bargaining unit in December 1989 and again in March 1990, and failure to apply the applicable collective-bargaining agreements to them; provided, however, that nothing herein shall be construed as requiring the Respondent to rescind any wage increases or other improved benefits or terms or conditions of employment which may have been afforded to these employees during the period of their unlawful removal from the bargaining unit.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Huntington Beach, California facilities copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[11] Although art. V, ''Deduction of Dues,'' of both collective-bargaining agreements provides for union dues-checkoff procedures, there is no evidence that any of the employees who were removed from the unit had authorized dues deduction. Consequently, the Respondent shall not be ordered to reimburse the Union for any lost dues resulting from the Respondent's unlawful removal of the employees from the unit. *United Technologies Corp.*, 287 NLRB at 207; *Bay Shipbuilding Corp.*, 263 NLRB 1133 fn. 6.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally remove bargaining unit employees from, and return them to, the bargaining unit described in section 1, ''Employees Represented,'' of article I, ''Recognition,'' of the 1987–1990 and 1990–1993 collective-bargaining agreements between us and the Union, the Southern California Professional Engineering Association.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL return the former MDAIS bargaining unit employees, who were reassigned to nonunit MDESC positions in December 1989 and March 1990, to the bargaining unit, without loss of seniority.

WE WILL recognize the Union as the collective-bargaining representative of the above employees, as part of the recognized bargaining unit, and apply the applicable collective-bargaining agreements to them.

WE WILL make the above MDAIS employees whole for any loss of earnings and other benefits suffered as a result of our removal of them from the bargaining unit in December 1989 and again in March 1990, and our failure to apply the applicable collective-bargaining agreements to them.

MCDONNELL DOUGLAS CORPORATION; MCDONNELL DOUGLAS ELECTRONIC SYSTEMS COMPANY, A DIVISION OF MCDONNELL DOUGLAS CORPORATION; AND MCDONNELL DOUGLAS AEROSPACE INFORMATION SERVICES COMPANY, A DIVISION OF MCDONNELL DOUGLAS CORPORATION

Frank Wagner, Esq., for the General Counsel.
James A. Adler, Esq. (Irell & Manella), of Los Angeles, California, for the Respondent.
Leonard C. Ricks, Executive Director SCPEA, of Westminster, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Los Angeles, California, on August 20 and 21, 1991. The charge was filed by Southern California Professional Engineering Association (SCPEA or the Union) on April 27, 1990. Thereafter, on May 31, 1991, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by McDonnell Douglas Corporation, and its various components (collectively the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). An amended complaint was issued on August 1, 1991, and an amendment to the amended complaint was issued on August 9, 1991. The Respondent's answers to the various complaints, duly filed, deny the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent.

On the entire record,[1] and based on my observation of the witnesses and the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, at all times material, has been engaged at various locations in the United States in the manufacture of aircraft and related products, and operates a facility in Long Beach, California. In the course and conduct of its business operations the Respondent annually sells and ships goods and products valued in excess of $50,000 directly to points outside the State of California.

It is admitted, and I find, that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that SCPEA is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issue raised by the pleadings is whether the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act by removing approximately 32 scientific programmers from a collective-bargaining unit represented by SCPEA and changing their status to that of nonunit employees.

[1] The General Counsel's unopposed motion to correct transcript is granted.

B. *The Facts*

SCPEA represents some 6000 professional employees of the Respondent. For many years the Respondent, including its various component divisions, has been signatory to a succession of collective-bargaining agreements with SCPEA. The current contract between the parties extends from March 5, 1990, to February 28, 1993.

While there is only one companywide collective-bargaining contract between the Respondent and SCPEA, the parties disagree whether there is more than one collective-bargaining unit as a result of the fact that the Respondent's various component companies are distinct entities. Thus, the General Counsel and Charging Party maintain that there is only one unit since the various components bargain jointly with SCPEA, and jointly execute a single collective-bargaining agreement that contains no language indicating recognition of SCPEA in more than one unit. The Respondent, on the other hand, believes that separate bargaining units exist and that they are coextensive with each distinct operating company or division of the corporation. It appears, however, that the scope of the unit or units is not a significant issue in this proceeding.

One of the component divisions of the Respondent is McDonnell Douglas Electronic Space Systems Company (MDESC) located in Santa Ana and Huntington Beach, California. This division focuses primarily on electronic systems, with much of its work being highly classified defense contracting.

Another component division is McDonnell Douglas Aerospace Information Services Company (MDAIS) which, until a corporatewide decentralization program was placed into effect in 1989, provided, inter alia, computer and engineering services to various component divisions of the Respondent, including MDESC. MDAIS, for purposes of this proceeding, may be characterized as simply a ''services'' oriented division which leased personnel to other components but did no research or development on its own. It employed approximately 4500 employees who provided information system services to various components located in St. Louis, Missouri, and in California, primarily in Long Beach and Huntington Beach. Approximately 1700 of these individuals were MDAIS professional employees who were loaned out or leased to various components. Of this number, only approximately 194 were represented by SCPEA.

In December 1988, as part of a corporatewide decentralization program, the Respondent determined that its various aerospace components could perform their missions more effectively if MDAIS' labor pools of professional employees were dissolved and the employees transferred to the components they served so that each component would be responsible for the design, programming, testing, and implementation of the automated systems being developed or produced within that component. As a consequence, it was determined that the approximately 1700 MDAIS professional employees currently being leased by MDAIS to the various components, including the 194 SCPEA-represented employees, would be transferred to and would become employees of the components themselves. Thus, they would no longer be employees of MDAIS.

On the West Coast, the first major transfers took place on June 26, 1989, when almost 300 engineers, scientists, and other MDAIS employees were transferred from MDAIS to another component, Douglas Aircraft Company, to which division the transferred employees had previously been leased. Approximately 75 of these employees were represented by SCPEA.

The remainder of the transfers of MDAIS employees to West Coast components were made on December 23, 1989. Approximately 66 MDAIS engineers became employees of another division, McDonnell Douglas Space Systems Company (MDSSC). Of this number, 15 employees were employed in classifications which had been within the SCPEA bargaining unit at MDAIS; and all 15 were transferred to corresponding positions which remained within the SCPEA unit at MDSSC.[2]

Further, 39 MDAIS engineers became MDESC employees. Of this number, 4 employees had not been in the SCPEA unit, and they continued to be nonunit employees thereafter; 3 employees had been in the SCPEA unit and remained in that unit thereafter; and 32 of the employees who had been in the SCPEA unit were classified into nonunit positions. Neither the jobs nor the work locations of these 32 employees, referred to by the Respondent as embedded software engineers, changed after the transfer, and they continued to work in the same secured areas, denoted as embedded software areas or ''vaults,'' and sometimes even in the same cubicles[3] as some 77 MDESC nonunit employees.

The complaint alleges that the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act by removing these 32 employees from the bargaining unit and by placing them in nonunit positions.

The evidence, as detailed below, shows that the 32 effected employees have continued to perform the same work at the same work stations for MDESC as they did prior to the transfer, and that their day-to-day supervision has not changed. On this basis the General Counsel maintains that the transfer from MDAIS to MDESC was merely a paper transaction which has no material effect on the wages, hours, and working conditions of the employees who, as a result, may not be removed from the unit.

The Respondent, on the other hand, maintains that that the 32 effected employees no longer have a separate identity within the MDAIS structure in terms of ultimate supervision and raises, promotions, career opportunities, reductions in force, and similar labor relations matters, but rather have been merged for all such purposes with the larger group of MDESC nonrepresented employees who perform the same or similar work. Under such circumstances, the Respondent contends that it is not required to perpetuate distinctions which no longer exist by maintaining two distinct classes of employees who perform identical or substantially similar work under the same supervision.

Further, the Respondent maintains that in anticipation of the unit problems brought about by the corporatewide decentralization or reorganization, the parties had previously agreed on an approach to the problem which provided for resolution within the grievance and arbitration provisions of

[2] As stated above, it does not appear to matter whether there was one or more than one bargaining unit, as one collective-bargaining agreement covers all the SCPEA-represented employees.

[3] However it should be noted that although the employees may have shared the same cubicles, they did not necessarily work on the same projects, as offices are allotted according to available space rather than according to function.

the contract, and that therefore the issue presented herein should be deferred by the Board to that process.

L. Russell Jansen, staff senior manager, employee relations, MDESC, testified that it was not uncommon, either because of mistaken application of the meaning of a 1988 grievance settlement between the Respondent and SCPEA, or because of a longterm change in work assignment, that embedded software engineers would be reclassified either into or out of the unit according to the work they happened to be performing. In 1988 a dispute arose regarding the placement of employees within the embedded software area, and SCPEA filed a grievance. The Respondent and SCPEA arrived at a tentative agreement regarding the clarification of the bargaining unit with respect to embedded software work.[4] Thus, the parties agreed that certain specified embedded software work either was or was not work within SCPEA's jurisdiction. Thereupon, applying the language of the tentative agreement, the Respondent undertook to audit all the embedded software employees in order to determine their proper placement. SCPEA was advised that as a result of the audit, six unit employees would be reclassified to nonunit classifications, and two nonunit employees would be reclassified to unit classifications.[5] SCPEA agreed to this resolution of its grievance and, thereafter, on about October 17, 1988, the tentative agreement became binding on the parties.

It is important to note that the foregoing dispute and its resolution had, at that time, no effect on the SCPEA-represented MDAIS embedded software engineers who were leased to the predecessor of MDESC;[6] these employees, who were deemed to be within the bargaining unit, were not on the payroll of MDESC or its predecessor and, accordingly, their job functions were not audited, as it was simply assumed that MDAIS would remain in existence and would continue to supply labor to MDESC. However, approximately a year later, following the reorganization and the resultant December 1989 transfer of these employees to MDESC, the Respondent then applied the terms of the aforementioned embedded software agreement to them, and removed them from the unit on concluding that they were nonunit embedded software engineers. The Respondent relies on this 1988 agreement as dispositive of the issue herein, and has offered to arbitrate any disagreement as to the proper placement of the engineers.[7] SCPEA and the General Counsel maintain that the 1988 agreement did not purport to deal with the then MDAIS employees, and that, in any event, the Board may not compel arbitration of unit placement issues.

Jansen testified that there are problems with unit employees working side by side and doing the same work as nonunit employees. Thus, unit employees, in accordance with the contract, receive a higher rate of pay for overtime work; the amount of money in the two separate merit pools, which are the source of funds for the employees' annual wage increases, may be proportionally larger for the unit employees; and the Respondent's contribution to the current 401K savings plan is greater for the unit employees than for the nonunit employees. The greater concern, however, according to Jansen, is as follows:

> The concern I would have is if I have two engineers with like skills, two embedded software engineers doing the same work and we had to lay off people, if management in reviewing the employees determined that a SCPEA-represented engineer was less qualified to do the remaining work, that engineer could file a grievance based on discrimination for Union participation, putting us in the same mess we're in today, arguing over, you know, who appropriately has the rights to that work, SCPEA or non-SCPEA employees. You know, it just makes doing business as a manager much more difficult when you have two different classifications doing the exact same kind of work.
>
> Now, keep in mind there's been a lot of discussion about SCPEA and non-SCPEA employees working side-by-side. That exists throughout the facilities all the time, but normally, they are not doing the same types of engineering work . . . they're doing different types of work on similar projects or proposals.

Jansen went on to state that, prior to the reorganization, if MDESC no longer needed the MDAIS people or needed to lay off personnel, MDESC would simply send them back to MDAIS, and MDAIS would decide whether to reassign to a different job with another component or to lay them off.

Gale Schluter is currently vice president and general manager of Surveillance and Electronics Systems. During times material, he was vice president and general manager of Advanced Command Control Communications and Intelligence Systems within MDESC. Schluter testified that prior to the reorganization of MDESC employees and MDSIC employees, although performing similar embedded software work in the same or adjoining cubicles in the embedded software vaults, and although having essentially the same wages, hours, and working conditions and day-to-day technical supervision, were otherwise treated differently within the administrative scheme of the two entities. MDESC employees, whether unit or nonunit, are evaluated and ranked on a

[4] ''Embedded software'' is a term that may not be comprehensively defined by a succinct definition. The principal characteristic is that the software is embedded in and is an integral part of an an overall system, such as a high-speed missile, and must rapidly process information from various types of sensors and issue control commands within a certain time constraint to some other part of the system for execution. Nonembedded software is, for example, software which calculates a payroll or an accounting or spreadsheet program where the response time is not a critical factor. The design of embedded software, because of the critical time constraints, is considered to be a distinct discipline.

[5] There are also some SCPEA-represented employees who work in the embedded software vaults, but who do not perform embedded software work. These employees were not involved in the grievance settlement.

[6] MDESC was not in existence at the time of the 1988 agreement. Rather, the agreement was between SCPEA and McDonnell Douglas Astronautics Company (MDAC) which, in December 1988, as a result of a corporate reorganization, was divided into two components, one of which was MDESC. This reorganization had no effect on the work of the engineers involved herein who, until December 1989, remained MDISC employees.

[7] In this regard it should be noted that the work of the embedded software engineers is classified, and that not only does SCPEA not know exactly what each engineer is doing, but also even some of the managers may not have the proper clearance to be advised of certain work. However, the record clearly demonstrates that the general nature of the work of each employee, in sufficient detail, could be properly presented to an arbitrator without compromising security.

''totem pole'' or relative performance list, with the employee at the top of the list being the individual with the greatest potential/performance value to MDESC within a given classification; the remaining employees are similarly evaluated and ranked in descending order. From this totem pole, yearly merit increases are determined. Further, MDESC supervision had the responsibility of disciplining and terminating MDESC employees. MDAIS employees, on the other hand, were not part of this ranking system. Rather, they were evaluated by MDAIS managers, with input from MDESC supervisors as to their performance, and were given merit increases accordingly. They were not subject to discipline, lay off, or termination by MDESC supervision; rather, in the event the services of an MDAIS employee were no longer desired, for whatever reason, that particular employee would simply be sent back to MDAIS, perhaps for reassignment to another component, and his or her future tenure or work assignment was not dictated by MDESC. According to Schluter:

> Since MDAIS was a sister component or a sister company, I guess, as a management approach we would collaborate with MDAIS at the end of each year to make sure that we had some input into the performance assessment of the MDAIS people, but aside from that, I think the business relationship was basically the same with MDAIS as it would have been with an outside company.

Schluter explained that although MDESC also directly hired its employees, the MDAIS labor pool had distinct advantages to the efficiency of MDESC. MDAIS provided a service, namely a source of labor, and its primary customers were the other components of the Respondent. There were advantages in utilizing MDAIS in terms of the hiring and ''off-loading'' of employees, as this alleviated the recruitment and screening selection and hiring process, and the lengthy security background investigation for classified work which takes about 9 months on the average. Thus, prior to obtaining the requisite security clearance, an employee would be hired by MDAIS, sometimes with collaboration by MDESC, and would then be placed by MDAIS within some other component until his or her security clearance had been approved. Further, there were additional financial advantages because MDAIS offered labor at attractive rates.

Schluter also pointed out that the employees' career paths differed according to the particular employing component: thus their opportunities for advancement depended on the organizational structure of the employing entity.

Leonard Ricks is executive director of the Union. Ricks testified that although he was aware, as a result of various conversations with Respondent's representatives, that MDAIS employees would be transferred to the components they were servicing, he was never advised that this transfer of MDAIS employees would result in their removal from the unit. Thus Ricks explained that MDAIS employees were always being transferred between components with no change in their status as unit employees. Accordingly, the transfer of the employees was a ''non-event.'' Regarding the aforementioned 1988 agreement, Ricks acknowledged that he understood that the agreement would govern the parties' relationship in the future, and was not limited to the then current employees, and that new hires and current employees were subject to future inclusion or removal from the unit in accordance with the terms of the agreement. However, according to Ricks, the agreement simply had no relevance to the MDAIS employees represented by SCPEA, as they were admittedly within the bargaining unit.

Ricks acknowledged that, on being advised of the reorganization, he was concerned that the transfers of MDAIS nonunit employees to the various components could be a problem, as ''they were mixing groups that hadn't previously been mixed, and it was resulting in bargaining unit people and non-bargaining unit people under the same supervision, and we were quite concerned about that.'' This was briefly discussed with Ken Erikson, general manager of labor relations, who told Ricks not to worry because SCPEA had good language in the recognition clause of the contract which defined the unit, and that was the best assurance that the unit would not be eroded. Erikson stated that the Respondent was committed to resolve any such matters after the transfers had been completed, so that the parties would be able to clearly determine the nature of the employees' work. Ricks apparently acceded to this suggestion.

In fact the parties did resolve such differences. Thus, at another component company, Douglas Aircraft Company (DAC), the Union objected to the fact that there were 11 nonunit employees who were doing bargaining unit work as a result of the reorganization, and that they were sitting side-by-side and doing the same work as unit employees. The Respondent agreed, and the 11 employees were reclassified into bargaining unit positions. In another situation, 14 nonunit employees were performing similar work as 2 former MDAIS unit employees, and when these 2 people were transferred to DAC the 14 individuals were placed in the unit.

Ricks, in effect, stated that even if the the 32 employees in question herein are performing nonbargaining unit work as defined by the language in the agreement, it nevertheless is the Union's position that because the work has been within the unit for some 20 years it must remain in the unit. Thus the Respondent, in effect, has waived whatever right it previously had to remove the work from the unit.

Ernie Ridenhour is corporate vice president of information resources management for McDonnell Douglas Corporation, and the chief executive of MDAIS. Ridenhour testified that in 1988 there were 1700 employees in the MDAIS professional services labor pool, comprised of professional scientific programmers. Only 194 of these individuals were represented by SCPEA. All 1700 of these people, including the 194 bargaining unit employees, were transferred directly to the various components as a result of the reorganization. Of the 194 individuals represented by SCPEA, all but the 32 employees in question herein remained in the bargaining unit as employees of the various components rather than as employees of MDAIS.

Ridenhour testified that the MDAIS management staff was comprised of only a small number of managers or supervisors. He explained that:

> [W]e did not require as many supervisors in this area like the traditional ratio of maybe 1 to 16 . . . because when we assigned these people, these scientific people, to work with the components now, they took their work

> direction and those kinds of things from the people that were responsible for the job.

However, after the transfer the employees became part of MDESC for performance evaluations, raises, and replacement. The components now directly hire their own employees and do not procure them through MDAIS which no longer has a labor pool of scientific programmers.

Ken Erikson is general manager of labor/management partnership at the Douglas Aircraft Company. He was the principal spokesperson for the Respondent during the bargaining negotiations which commenced in October 1989. Erikson testified that the subject of the reorganization was brought up by Ricks at the outset of negotiations. Ricks expressed the Union's concern that nonunit MDAIS employees would be transferred to work with unit employees who were already employed by the component, and that this work belonged to unit employees. Erikson suggested that such matters regarding classifications continue to be handled as they had in the past, namely, that the work the employee was performing after the transfer would determine whether he or she was in the unit. According to Erikson, the Union agreed to handle the matter in this manner. In fact, as noted above, this process was implemented after the reorganization; there were various transfers of employees into and out of the unit, and the net result was that the SCPEA unit was increased by 19 employees.

Lawrence Gunther is a senior manager of software development for MDESC. Eight line managers report to him, and all the people under his authority are involved in embedded systems software. Gunther testified that before the reorganization unit employees of MDAIS worked together on some of the same projects with nonunit MDESC employees, and that this working relationship has continued with no change in functions.

C. *Analysis and Conclusions*

The material facts are not in dispute. For many years scientific computer analysts, specialists, and engineers, represented by SCPEA, have been employed by MDAIS or its predecessors and have been loaned or leased to various components of the Respondent where they have performed work side-by-side, and sometimes on the same project, with nonunit employees who were hired by and work directly for the component. The wages, hours, working conditions, and even day-to-day supervision of both the unit and nonunit employees have remained essentially the same, except that the SCPEA-represented employees were paid by MDAIS rather than by the component. In 1989 this relationship changed for some 1700 individuals, including 194 employees who were represented by SCPEA, as a result of a corporatewide reorganization undertaken for efficiency and accountability purposes. As a result, each of the 1700 individuals was transferred to, and became employed by, the component for which the employee had been previously working.

The reorganization presented relatively few difficulties in terms of bargaining unit expansion or contraction, and the differences that did arise were resolved by SCPEA and the Respondent in a mutually agreeable manner which was dictated by the specific nature of the work performed by the employee after the transfer. In some instances former unit employees were excluded from the unit, and in other instances former nonunit employees were included within the unit. The parties, however, have been unable to resolve the placement of 32 engineers whom the Respondent believes are embedded software engineers and who are performing particular work which, pursuant to a prior agreement with SCPEA, is nonunit embedded software work.

SCPEA maintains that some or all the 32 employees in question do not perform embedded software work of any kind, and that further, even if they do perform what has previously been agreed on as nonunit embedded software work, such agreement does not apply to them because they have historically been considered to be unit employees even though they have worked side-by-side with nonunit employees. To SCPEA the corporate reorganization is simply a paper transaction, a ''non-event'' which should have no effect on the representational status of the employees involved.

In this regard, SCPEA and the General Counsel rely on a prior Board decision, *McDonnell Douglas Astronautics Co*., 194 NLRB 689 (1971), in which the Board clarified the bargaining unit and found that the transfer of 114 employees, comprising the same classifications of employees as are involved herein, to a newly formed component, McDonnell Douglas Automation Company (MCAUTO), the predecessor of MDAIS, was insufficient to remove them from the unit. The Board found that the transfers of the employees to the ''new'' component was ''apparent on paper only'' and that MCAUTO was not functionally new but rather was a ''creature made up of existing scientific programming facilities from two existing components, who have long bargained with the Petitioner.'' The Board stated that:

> Despite the complete operating autonomy which each of these companies is said to have, there is nothing on this record which in any way suggests that the companies involved are not part of an organization that is an integrated whole with ultimate common control. In these circumstances the transfer of employees between component companies, reflecting no change whatsoever in their work location and admittedly no substantial change in their supervision—certainly none that is ascertainable on the record before us—cannot be viewed as effectively removing the employees involved from the currently recognized bargaining unit.

SCPEA and the General Counsel assert that the instant attempt to remove the employees from the unit by placing them back where they originated, namely, as employees of one of the original components or its successor, is similarly an impermissible paper transaction. I do not agree.

In the instant case the employees have not been removed from the bargaining unit as a result of a paper transaction with no accompanying substantial changes in the terms or conditions of their employment.[8] They are now employees of MDESC and, as such, will be evaluated within MDESC's totem-pole hierarchy as part of a significantly larger group of employees; both their merit increases and the possibility of layoff as a result of defense industry cutbacks may thereby be directly effected. Nor do they any longer have an alter-

[8] Cf., the cases cited by the General Counsel: *McDonnell Douglas Astronautics Co*., supra; *Carolina Telephone & Telegraph Co*., 258 NLRB 1387 (1981); *Arizona Electric Power Co*., 250 NLRB 1132 (1980); *Bay Shipbuilding Corp*., 263 NLRB 1133 (1982).

nate career path through MDAIS. Additionally, however, should they also be included within the unit, they will enjoy benefits that their colleagues, who perform the same work under the same supervision, and with whom they ''compete'' for placement upon the totem-pole, do not enjoy. Thus, they will receive greater overtime pay and contributions to their 401k plans; they may receive relatively greater annual merit wage increases as a result of their placement in the SCPEA merit wage pool, and they have the protection of a contractual grievance and arbitration provision. It is reasonable to conclude, under the circumstances, that to perpetuate such an anomalous situation, occasioned by happenstance rather than design, is to virtually guarantee a disharmonious working relationship among two classes of employees; and under such an artificial system the Respondent's managerial difficulties will similarly be compounded.

The number of employees involved herein is relatively small, and the record abundantly demonstrates that the parties have established both procedures and precedent for resolving unit placement issues of this nature. Simply stated, either all the employees performing the work in question are within the unit as set forth in the collective-bargaining contract and/or the 1988 embedded software grievance agreement, or they are not, and the Respondent is proposing that such matters be left to the grievance and arbitration process. At the time the embedded software agreement was entered into, neither SCPEA nor the Respondent anticipated the reorganization that has occasioned the current dispute; however, SCPEA has acknowledged that the 1988 embedded software agreement was prospective in nature and would apply to future employees of MDESC. It is clear that the instant chain of events has not been contrived by the Respondent as a means to erode the unit; rather, as the record demonstrates, the Respondent is motivated by legitimate business considerations. In agreement with the Respondent, the instant dispute seems to be a situation peculiarly susceptible to resolution through the grievance and arbitration machinery of the contract. Accordingly, I shall dismiss the complaint in its entirety.[9] See *Transport Service Co*., 282 NLRB 111 (1986).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. SCPEA is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

[9] The complaint also alleges that the Respondent violated Sec. 8(a)(5) of the Act by temporarily transferring the 32 individuals back into the unit in March 1990, for the purpose of permitting them to receive their annual merit wage increase from the merit wage pool earmarked for the unit employees, and by returning them to permanent nonunit status 1 week later. This was simply a paper transaction implemented by the Respondent after notice to and discussion with SCPEA, undertaken for the purpose of permitting the 32 employees to share in the unit merit pool in which they had been included for all of 1989. As I have found that the Respondent did not violate the Act by transferring the employees to nonunit positions in December 1989, I similarly find that the March 1990 temporary transfers, undertaken by the Respondent for legitimate administrative purposes, was not violative of the Act.